IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1085 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VALJI HARJI DABASIYA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR.IJAZ QURESHI, FOR MR.SHAKEEL A QURESHI for Appellant,
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 01/11/2007

ORAL JUDGMENT

Present appeal is preferred under the provisions of Section 374 of the Code of Criminal Procedure, challenging the legality and validity of the judgment

and order of conviction and sentence passed by the learned Special Judge, Kutchh-Bhuj, in Special Case No.113 of 1995, on 11th December, 2002, whereby the appellant-accused was charged and tried for the offence punishable under Section 27 and under Section 20 (B) of the Narcotics Drugs and Psychotropic Substance Act, 1985(herein after referred to as the "N.D.P.S. Act"). However, at the conclusion of the trial, the learned trial Judge was pleased to convict the appellant-accused for the charge of offence punishable under Section 20 (2) (A) of the N.D.P.S. Act and sentenced him to undergo three months rigorous imprisonment and to pay a fine of Rs.5,000/- and in default punishment is of one month simple imprisonment. The learned Judge has also given the benefit of set off.

2. To appreciate the rival contentions, firstly it would be beneficial to state the basic facts of the case which is mainly reflected in the charge framed at Exh.4 and same is reproduced herein below.

> "On receipt of the secret information by the Task Force Police that you accused-person,

resident of village Mankunva are selling foreign made liquor in the said residence, Mr.A.N.Vala, Police Inspector, on 2nd August, 2005 at about 20:15 hours raided the aforesaid house of the you-accused person alongwith the Panchas and on seeing the Police you accused person started running. Thereafter, the Police had searched you accused person and from the pocket of “Payzama” two sealed plastic bags were recovered and on breaking upon one bag, smell of Ganja was emitting. Upon asking you accused person about pass or permit for possessing Ganja, you accused person denied the same. Thereafter, on weighing the Ganja including the plastic bag, which was recovered from you accused person, it was weighing 17 Kg. Thus, you accused person possessed 17 Kg of Ganja with an intention to sell without any pass or permit and committed offence punishable under Sections 27 and 20 (B) of the Narcotics Drugs and Psychotropic Substance Act, 1985.”

3. Mr.Ijaz Qureshi, learned Advocate appearing on behalf of Mr.S.A.Qureshi, learned Advocate for the appellant has taken this Court mainly the grounds of challenge as mentioned in memo of appeal and has submitted that judgment and order of conviction and sentence is bad in law and without appreciating the

fact that mandatory requirements of Section 50 of the N.D.P.S. Act has not been complied with. He has submitted that total 17 Kg. of Ganja was allegedly found during the personal search carried out from the accused. He has submitted that basically the Police had received secret information that the accused is involved in the activity of selling foreign made liquor which is punishable under the Bombay Prohibition Act, but it appears that the Police had failed in recovery of any prohibited liquor from the accused and therefore he was falsely implicated in serious offence punishable under the N.D.P.S. Act. He has submitted that the Panchas have not supported the case of prosecution.

3.1 It is also submitted that on plain reading of the complaint, it clearly reveals that before carrying out personal search of the appellant-accused, no opportunity was offered to him as contemplated under Section 50 of the N.D.P.S. Act. When it is the say of prosecution itself that on seeing the Police the accused started running,

thereafter the accused was intercepted and searched by the police and during that search the muddamal Ganja was found from the pocket of the “Payzama” of the appellant-accused. It was also ascertained by the Police that substance found from the accused was Ganja. Thereafter some attempts were made by the Raiding Officer to see that requirement of Section 50 of the N.D.P.S. Act was complied with. It is submitted that in the impugned judgment and order the learned trial Judge has discussed in paragraph 16 that scheme of Sections 41 and 42 of the N.D.P.S. Act would not be attracted in the present case and learned trial Judge has not considered the scheme of Section 43 read with Section 50 of the N.D.P.S. Act. It is also submitted that as per settled legal position scheme of Section 50 of the N.D.P.S. Act is mandatory and it is found from the evidence and from the papers of investigation that when there is no strict compliance of Section 50 of the N.D.P.S. Act, the accused should be given the advantage. The learned trial Judge in the impugned judgment has observed that in the present case no strict

compliance of Section 50 was made by the Officer, even though carried out the personal search of the accused. Ultimately, the substance found from the accused was only 17 Kg., and therefore, the scope of planting the substance cannot be ruled out, is the say of learned Advocate for the appellant. So, according to Mr.Qureshi on the sole ground of not complying strictly the mandatory requirement of provisions of Section 50 of the N.D.P.S. Act by the raiding Officer, the appellant may be acquitted from the charge levelled against him.

4. Ms.Pandit, learned A.P.P., on the other hand has also taken this Court through the evidence of the witnesses and mainly the evidence of Prosecution Witness No.2-Aalkubhai Nagbhai Vala, who has been examined at Exh.9. She has submitted that on plain reading of the evidence of this witness, it clearly reveals that no strict compliance of Section 50 was adhered which can be said to be strict compliance and that too in the correct legal perspective. Ms.Pandit, has taken this Court through the relevant

part of the judgment under challenge where the learned trial Judge has referred the relevant Provisions of Sections 41, 42 and 50 of the N.D.P.S. Act.

5. After hearing both the Advocates, the Court has found enough force in the argument advanced by Mr.Qureshi. It is clear from the fact that before intercepting the accused, the Officer was not knowing that accused was carrying Ganja in his pocket. The raid was to be carried out suspecting the accused to be a person involving in the activity of selling of prohibited foreign liquor. So without observing the scheme of Section 50 of the N.D.P.S. Act, the physical search of the appellant-accused was carried out by the raiding Officer. Not only that the nature of substance was also determined by the raiding Officer, prior to making any offer as contemplated under Section 50 of the N.D.P.S. Act and therefore, it is not even possible for this Court to agree with the finding arrived at by the learned trial Judge that partial compliance of Section 50 of the N.D.P.S.

Act was made by the raiding Officer. The Panchas have also not supported the case of prosecution. Thus, the above discussion takes this Court to the conclusion that accused deserves to be acquitted from the charges levelled against him.

6. In the result, present appeal is allowed. The judgment and order of conviction and sentence dated 11th December, 2002, rendered by the learned Special Judge, Kutchh-Bhuj in Special Case No.113 of 1995 is hereby quashed and set aside. The appellant is acquitted from the charges levelled against him. Fine, if paid by the appellant, is ordered to be refunded to him on proper identification.

6.1 Bail Bond executed by the appellant-accused shall stand discharge. Order and Direction accordingly.

(C.K.BUCH, J.)

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